FOR ARGUMENT

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No. 75-1583

In the Supreme Court of the United States

OCTOBER TERM, 1976

FRANCES MORRIS, ET AL., APPELLANTS

v.

L. MARION GRESSETTE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will discuss the following question:

Whether the Attorney General's objection to South Carolina's reapportionment of its Senate in Act 1205, interposed after invalidation on judicial review of the Attorney General's earlier determination not to exercise his independent judgment in deference to a prior court decision, prevents Act 1205 from becoming effective under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c.

STATUTES INVOLVED

1. Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, and amended

by Sections 204, 206 and 405, Pub. L. 94–73, 89 Stat. 402, 404–405, 42 U.S.C. 1973c (Supp. V), is set forth at J.S. App. 57a–58a.

2. South Carolina Act 1205 is set forth in the appendix to this brief (App. A, *infra*, pp. 1A–8A).

INTEREST OF THE UNITED STATES

Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as extended and amended in 1970, 84 Stat. 315, and further extended and amended in 1975, 89 Stat. 402, 404, 42 U.S.C. (Supp. V) 1973c, requires that all changes in the voting laws or practices of covered jurisdictions be reviewed either in a declaratory judgment action in the United States District Court for the District of Columbia, or by the Attorney General. The change may not be implemented unless the court or the Attorney General determines that the change does not have the purpose or effect of discriminating on the ground of race.

The instant case directly involves the Attorney General's responsibilities under Section 5. It presents a direct conflict between the court below and the Court of Appeals for the District of Columbia Circuit[1] as to the availability of relief to compel the Attorney General to exercise independent review of changes in voting laws and practices subject to Section 5 of the Voting Rights Act.[2]

[1] *Harper* v. *Levi*, 520 F. 2d 53 (C.A.D.C.).

[2] The government has previously participated in various stages of this litigation. The Attorney General was the defendant in *Harper*, *supra*, and the United States submitted *amicus curiae* briefs supporting the plaintiffs in the court below, and urging this Court to note probable jurisdiction.

STATEMENT

Under Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, no change in the voting laws or practices of covered jurisdictions that alters such laws or practices in effect on November 1, 1964, may be enforced unless and until the change is declared, in a suit brought by the covered jurisdiction against the United States before a three-judge district court in the District of Columbia, to be without discriminatory purpose or effect. Such a proceeding becomes unnecessary, however, if the change has been submitted to the Attorney General and "[h]e has not interposed an objection within sixty days after such submission * * *" or has sooner indicated that he does not object. *Ibid.*

The State of South Carolina is a covered jurisdiction. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 318.

A. THE REAPPORTIONMENT LITIGATION

The events leading to the Attorney General's objection to Act 1205 began more than five years ago. On November 11, 1971, South Carolina enacted alternative reapportionment plans for the State Senate (Act 932). See *Harper* v. *Levi*, 520 F. 2d 53, 57 (C.A.D.C.). Both plans provided for multi-member districts, required candidates to run for numbered posts, and required primary elections to be decided by a majority

vote. *Id.* at 57–58. Private suits contending that Act 932 violated the Voting Rights Act and the Fourteenth and Fifteenth Amendments were filed and a three-judge court was convened to hear them (*Twiggs* v. *West,* D. S.C., Civ. No. 71–1106, decided April 7, 1972). *Id.* at 58. While these actions were pending, South Carolina submitted Act 932 to the Attorney General for Section 5 clearance. *Ibid.* On March 6, 1972, the Attorney General objected to Act 932 because he was "unable to conclude * * * that the combination of multi-member districts, numbered posts, and a majority (run-off) requirement would not occasion an abridgement of minority voting rights in South Carolina." *Ibid.*

Approximately one month later, the three-judge court rejected the Fifteenth Amendment claim for lack of evidence that the reapportionment was racially motivated (J.S. App. 47a), declined to consider the Voting Rights Act challenge to Act 932 (J.S. App. 30a), but held that the Act violated the Fourteenth Amendment due to malapportionment. *Twiggs* v. *West, supra* (J.S. App. 26a–49a). The court then allowed South Carolina 30 days within which to enact an acceptable substitute reapportionment plan (J.S. App. 48a).

On May 6, 1972, the South Carolina General Assembly passed the legislation involved in this case—Act 1205 (App. A, *infra,* pp. 1A–8A). Section 2 reapportioned the State's senatorial districts. It set forth two alternative apportionments, Plan A and Plan B, and provided that if Plan A did not "meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate * * * shall be apportioned" under Plan B (App. A, *infra,* p. 5A). This Act retained the provisions of Act 932 calling for multi-member districts, numbered posts, and a majority vote in primaries. *Harper* v. *Levi, supra,* 520 F. 2d at 57–58. Section 3 of the Act also included a provision extending the numbered post requirement to existing multi-member districts in the State's House of Representatives *Id.* at 58.

South Carolina's chief legal officer submitted Act 1205 to the Attorney General on May 12, 1972 (A. 33). Eleven days later, on May 23, 1972, the three-judge court held the Senate reapportionment constitutional (App. B, *infra,* p. 11A), and ordered Plan A into effect (*ibid.*). The court stated that it had considered a number of other plans and found no other plan to be a substantial improvement over Plan A.[3]

While the Attorney General was considering Act 1205, South Carolina, on May 30, 1972, submitted to the Attorney General additional legislation (Act 1204) which extended the numbered post requirement to "all multi-member elective districts" in South Carolina. *Harper* v. *Levi, supra,* 520 F. 2d at 58. On June 19, 1972, the Attorney General notified South Carolina that he had received the previously requested information concerning Act 1204, that the submission

[3] In an order dated June 9, 1972, denying plaintiff's motion to vacate or amend its May 23 order, the court stated that it had acted to grant relief because the General Assembly had failed to adopt a plan.

on Act 1204 was complete, and that the 60-day period for Section 5 review of that statute would begin on that date. 520 F. 2d at 59.

On June 30, 1972, the Attorney General interposed an objection to Act 1204 and to the part of Act 1205 that required numbered posts for the State's House (A. 47–50). He declined, however, to object to Section 2 of Act 1205, reapportioning the State Senate, because he felt "constrained to defer to the * * * determination of the three-judge District Court" in *Twiggs* (A. 48). The Attorney General wrote: "It would in our view not be appropriate to read the Voting Rights Act as requiring or permitting the Attorney General to review a determination made by a United States District Court in the proper exercise of its statutory jurisdiction" (*ibid.*).

B. THE SUIT TO COMPEL THE ATTORNEY GENERAL TO EXERCISE HIS DISCRETION

On August 10, 1972, two black South Carolina citizen sued the Attorney General in the District Court for the District of Columbia claiming that he had failed to exercise his discretion in not objecting to the Senate reapportionment in Act 1205, *Harper* v. *Levi, supra,* 520 F. 2d at 59. The next day, the single-judge district court entered an order stating that the time within which the Attorney General could object to Act 1205 had not expired and extending the time within which he could interpose an objection until

further order of the court, or a further decision of the Attorney General (Mot. to Aff. 19a–20a). On May 16, 1973, the single-judge district court granted summary judgment for plaintiffs and ordered the Attorney General to make "a reasoned decision in accordance with his statutory responsibility." *Harper* v. *Kleindienst,* 362 F. Supp. 742, 746 (D. D.C.), affirmed *sub nom. Harper* v. *Levi,* 520 F. 2d 53 (C.A.D.C.). In response to the order, the Attorney General filed a memorandum stating that in his opinion the Senate reapportionment had a "clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act," but, nevertheless, he felt constrained to defer to the *Twiggs* decision and he declined to enter an objection. (Brief for Appellant, 4a–11a).

The district court, on July 19, 1973, issued a second order directing the Attorney General to consider Act 1205 without regard to the decision of the [*Twiggs*] Three Judge District Court." *Harper* v. *Levi, supra,* 520 F. 2d at 59. Thereafter, on July 20, 1973, the Attorney General interposed an objection *nunc pro tunc* to the Senate reapportionment because he was "unable to conclude that Act No. 1205 does not have the effect of abridging voting rights on account of race" (A. 51–52).

On appeal from the single-judge court's orders in *Harper,* a divided panel of the District of Columbia

Circuit affirmed,[4] holding (520 F. 2d at 59–60); footnotes omitted)—

> that the court had jurisdiction [under 5 U.S.C. 702] of appellees' action, that the Attorney General's decision not to object was reviewable under the circumstances of this case, and that Section 5 requires him to make an independent determination on the merits of the Section 5 issues.

C. THE THREE-JUDGE COURT DECISION IN THIS CASE

After that decision became final, two other South Carolina voters filed the present suit, as a class action under Section 5, in the district court in South Carolina (A. 2–7).[5] Plaintiffs sought to enjoin implementation of the Senate reapportionment plan contained in Act 1205 on the ground that it had not been cleared under Section 5 by the Attorney General, or by a declaratory judgment action in the District Court for the District of Columbia (*ibid.*). A three-judge court convened under Section 5[6] unanimously

[4] Judge MacKinnon, dissenting, reasoned that Section 5's provision permitting a submitted change to be enforced within sixty days if the Attorney General failed to object committed the matter of objection solely to agency discretion. It was therefore unreviewable. 520 F. 2d at 73–74.

[5] The defendants, appellees in this Court, were the President Pro Tem, and the Clerk of the South Carolina Senate; the Governor and Lieutenant Governor; the members and Executive Director of the South Carolina State Election Commission; the Attorney General; and the Secretary of State of South Carolina.

[6] Two of the judges (Haynsworth, C. J., and Russell, J.) had participated in *Twiggs* v. *West*, *supra*.

dismissed the complaint (J.S. App. 1a–25a). It held that the doctrine of collateral estoppel did not preclude the court from considering South Carolina's contention that, notwithstanding *Harper* v. *Levi*, *supra*, the requirements of Section 5 were satisfied when the Attorney General failed to interpose an objection within sixty days after submission to him of the Senate reapportionment plan contained in Act 1205 (J.S. App. 5a). Second, it ruled that the original determination by the Attorney General under Section 5 to defer to the district court in *Twiggs* v. *West* and to decline to render an independent judgment was not judicially reviewable (J.S. App. 25a). Finally, it held that the failure of the Attorney General to interpose an objection within sixty days of the submission authorized the State of South Carolina to implement the Senate reapportionment plan contained in Act 1205 (J.S. App. 25a). Accordingly, the court denied the injunction and dismissed the complaint.

SUMMARY OF ARGUMENT

Since South Carolina Act 1205 has not been declared by the District Court for the District of Columbia to be without racially discriminatory purpose or effect, it cannot be implemented under Section 5 of the Voting Rights Act if the objection interposed by the Attorney General on July 20, 1973, *nunc pro tunc*, is valid. That in turn depends upon the power of the reviewing court in *Harper* v. *Kleindienst*, *supra*, to compel the Attorney General to exercise

his independent judgment, and to set aside his prior non-objection to Act 1205 on the ground that he had failed to perform his duty under Section 5 by deferring to a district court's approval of Act 1205 under the Fifteenth Amendment. It is now clear that district courts evaluating legislation subject to Section 5 may not pass upon Fifteenth Amendment issues until the procedures of Section 5 have been satisfied. *Connor* v. *Waller,* 421 U.S. 656. Accordingly, the Attorney General has abandoned his prior policy of deferring to such decisions.

His erroneous deferral in this case resulted, as the *Harper* court correctly held, in substantial injury to the statutory rights under Section 5 of voters in South Carolina. Those rights include being freed from compliance with changed election laws or procedures until they are cleared under Section 5; interposition of the District of Columbia court or the Attorney General between the voter and the covered jurisdiction; transfer from the citizen to the covered jurisdiction of the burden of initiating proceedings; assignment of venue to the District of Columbia; and shift of the burden of proof on the issue of discriminatory purpose or effect from the injured voter to the covered jurisdiction.

As noted in *United Jewish Organizations* v. *Carey,* No. 75–104, decided March 1, 1977 (slip op. 8) (Brennan, J., concurring): "Under § 5 of the Act, the Attorney General in effect is constituted champion of the interests of minority voters * * *."

But Congress' purpose is assigning this role to the Attorney General would be defeated if, pursuant to an erroneous deferral policy, he did not make an independent determination under Section 5, for the whole scheme of the Act rests upon the assumption that he will do so. This is confirmed by the Attorney General's regulations adopted in 1971, requiring him to make the same kind of independent determination that must be made by the District Court for the District of Columbia, and by Congress' reenactment of the statute in 1975 with full knowledge of those regulations. *Georgia* v. *United States,* 411 U.S. 526, 533.

The immediate effect of the Attorney General's failure to decide is the lifting of Section 5's automatic suspension, thus subjecting all citizens of a covered jurisdiction to the new voting requirements regardless of their discriminatory purpose or effect. Thereafter, their only remedy is a suit under the Fifteenth Amendment, the very remedy Congress found to be so inadequate that it enacted the special statutory protections of Section 5 to secure voting rights in covered jurisdictions. Thus the consequences of the Attorney General's failure to decide would fall not on him, but on the minority voters the Act is intended to protect.

The provision of Section 5 permitting voting changes submitted to the Attorney General to be implemented if "the Attorney General has not interposed an objection within sixty days of the submission" does not bar a suit by injured voters filed more

than sixty days after submission to compel him to make a determination. The legislative history shows that Congress intended preclearance by the Attorney General to be a convenience for covered jurisdictions. *Georgia* v. *United States,* 411 U.S. 526, 538. The Attorney General, however, was not simply to be given an opportunity to act; he was required to exercise his independent discretion in order to effectuate the Act's purposes. Congress could assume that this duty would be enforceable under the presumption of reviewability available to compel the performance of a duty to the plaintiff (28 U.S.C. 1361), including agency action unlawfully withheld (5 U.S.C. 706(1)). *Dunlop* v. *Bachowski,* 421 U.S. 560, 567; *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140. "Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States, supra,* 411 U.S. at 538.

The Act's sixty-day provision, therefore, should be construed, in light of the Act's history, to assure reasonable effectuation of Section 5's purposes. Cf. *Georgia* v. *United States, supra.* An action to compel the Attorney General to exercise his independent discretion fits those purposes, for without such review minority voters injured by his failure to decide would have no remedy whatever under Section 5. On the other hand, the remedy itself is a restricted, familiar and traditional form of mandamus. *Virginian Railway Co.* v. *System Federation No. 40,* 300U.S. 515, 551;

Thermtron Products, Inc. v. *Hermansdorfer,* 423 U.S. 336. Indeed, the remedy in *Harper* is directly analogous to that in *Dunlop* v. *Bachowski, supra,* involving limited, but somewhat broader judicial review to protect the rights of a union electorate.

Accordingly, Act 1205 should not have been implemented, and the district court should be directed to grant appellants' request for special elections, under a lawfully adopted plan, to be held in November 1978 to coincide with the general election to be conducted at that time.

ARGUMENT

THE ATTORNEY GENERAL'S OBJECTION INTERPOSED UNDER SECTION 5 OF THE VOTING RIGHTS ACT PREVENTS THE SOUTH CAROLINA SENATE REAPPORTIONMENT ACT FROM BECOMING EFFECTIVE AS LAW

It is conceded (Br. for Appellees, p. 9) that Section 5 of the Voting Rights Act of 1965, 79 Stat. 439, as amended, 42 U.S.C. 1973c, applies to the South Carolina Senate Reapportionment Act (Act 1205),[7] and that Act 1205 has not been declared, in an action brought by the State in the District Court for the District of Columbia, to be without the purpose or effect of denying the right to vote on account of race or color.[8] Accordingly, the objection to Act 1205 inter-

[7] See *Georgia* v. *United States,* 411 U.S. 526.

[8] Although the parties proceeded in the court below on the theory that Section 5 applies to Act 1205, appellants, in a post-judgment motion, filed after this Court's decision in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636, argued that under the rule of that case Act 1205 might be a court-ordered plan out-

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posed by the Attorney General prevents that Act from becoming effective as law unless that objection

side the scope of Section 5. Appellants no longer urge this point; all parties agree that Act 1205 is a legislative plan subject to Section 5's preclearance requirements. We discuss this question briefly, however, because there would have been no reason to reach the question of the validity of the Attorney General's objection in this case if Section 5's preclearance requirements were not applicable, and because the distinction between a legislative plan and a court-ordered plan is important in the administration of Section 5.

We believe that the reapportionment plan embodied in Act 1205 is not a court-ordered plan within the meaning of *East Carroll*. Contrary to the situation in *East Carroll*, the South Carolina legislature "reapportioned itself on its own authority." *East Carroll*, *supra*, 424 U.S. at 638–639 n. 6. The district court did not direct the preparation of a plan to be submitted for proposed adoption by it, but, rather, allowed the legislature 30 days to enact one.

We recognize, however, that the distinction between court-ordered plans under *East Carroll* and non-court ordered plans subject to Section 5 is not always clear. Act 1205, for instance, has some attributes of a court-ordered plan. While Plan A is stated in enacting language ("the state of South Carolina is hereby divided into the following Senatorial Districts" (App. A, *infra*, p. 4A)), the Act includes as an alternative Plan B which is to take effect "[i]n the event that Plan A does not meet the constitutional guidelines as set forth by the Three Judge Federal Court * * *" (App. A, *infra* p. 5a). It also recites the consensus of the Legislature that the two plans should be submitted to the district court in the hope that the court would adopt one (App. A, *infro*, p. 3A). The district court, indicating that it had found no other plan to be a substantial improvement over plan A contained in Act 1205, approved that plan (App. B, *infra*, 11A). In our view, however, the controlling fact is that the legislature acted on its own authority. The subsequent approval of the legislature's enactment does not change its nature or origin. Accordingly, the plan "[could] not be effective as [law] until and unless cleared pursuant to § 5." *Connor* v. *Waller*, 421 U.S. 656. See also *United States* v. *Board of Supervisors*. No. 76–489, decided February 22, 1977. Should this Court, however, determine that Act 1205 is a

is invalid.[9] The validity of that objection turns on the availability of judicial relief to compel the Attorney General to exercise independent review of changes in voting laws and practices subject to Section 5.

The court below concluded that the district court in the *Harper* litigation was without jurisdiction to order such relief, and hence held the Attorney General's otherwise untimely objection to be a nullity. We submit that the district court misapprehended the language and purpose of Section 5, and disregarded the fact that *Harper* involved only a traditional remedy to compel the exercise of administrative discretion.

The Attorney General's letter of June 30, 1972 (A. 47) did not represent his independent determination as to whether the Senate Plan in Act 1205 had the purpose or effect of abridging the right to vote on account of race. Rather, as the letter expressly indicates (A. 48), the Attorney General declined to make that determination in deference to the decision of the three-judge court in *Twiggs* (App. B, *infra*, pp. 9A–11A), which held that Act 1205 met the requirements of the Fifteenth Amendment.

court-ordered plan, the presumption against the use of multi-member districts would, of course, apply. *East Carroll*, *supra* 424 U.S. at 639.

[9] If the objection is valid, appellees may seek a declaratory judgment from the district court for the District of Columbia that the Act "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. * * *" 42 U.S.C. 1973c. See *Beer* v. *United States*, 425 U.S. 130; *City of Petersburg* v. *United States*, 410 U.S. 692, affirming 354 F. Supp. 1021 (D. D.C.). They have not done so.

This policy of deference, however, was incorrect. It was based upon the then prevalent belief that a local district court seised of a reapportionment suit involving voting law changes adopted after November 1, 1964, "unquestionably had jurisdiction to consider the issues presented to it under both the Fourteenth and Fifteenth Amendments" (A. 48). See *Georgia* v. *United States, supra,* 411 U.S. at 527. In 1975, however, this Court held in such a suit (*Connor* v. *Waller,* 421 U.S. 656) that new reapportionment legislation adopted in the course of litigation is not effective in a covered jurisdiction until clearance under Section 5 has been obtained from the District Court for the District of Columbia or the Attorney General. Therefore a local district court erred in considering the constitutionality of such legislation under the Fifteenth Amendment. See also *United States* v. *Board of Supervisors,* No. 76–489, decided February 22, 1977. Thus under the rationale of *Waller,* the district court in *Twiggs* should not have considered the Fifteenth Amendment issue at all, nor should the Attorney General have deferred to its decision.[10]

The question remains whether the *Harper* court had jurisdiction, on judicial review, to nullify this erroneous determination, so that the Attorney General could reconsider South Carolina's submission of Act 1205 *nunc pro tunc.* The court below denied such

[10] The government's appeal from the district court's decision in *Harper* (*Harper* v. *Levi,* 520 F. 2d 513 (C.A.D.C.)) antedated this Court's decision in *Connor* v. *Waller, supra.*

jurisdiction on several grounds. First, it held the Attorney General's action of June 30, 1972 was not "adjudicatory", i.e., it had no binding effect on anyone's legal rights (J.S. App. 14a–15a). Moreover, it reasoned, any party dissatisfied with the Attorney General's failure to object had an adequate remedy in court, because Section 5 expressly provides that "neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement [of the change in election procedures]" (J.S. App. 15a). Thus, in the court's view, no private voter can be "adversely affected" or suffer any injury in fact entitling him to seek judicial review under the Administrative Procedure Act, 5 U.S.C. 702. The court further concluded that the express language of Section 5, as well as its legislative history, demonstrated that determinations by the Attorney General under Section 5 are not reviewable. To allow such review, it said, would, through delay, defeat the purpose of that sixty day limit within which the Attorney General can object before a submitted change in voting procedures may become effective and would require the Attorney General to make explicit reviewable findings, in the absence of a statutory requirement that he do so (J.S. App. 20a–23a). The court also stated that such review would be inappropriate because it would be available to private parties, in the form of a suit before a single judge district court under 5 U.S.C. 702, but would not be equally available to the states covered by Section 5, since the

states' sole remedy is by a declaratory judgment action in a three-judge district court in the District of Columbia (J.S. App. 24a–25a).

The district court's conclusion that no rights are determined when the Attorney General defers to a court ruling instead of exercising independent discretion is incorrect. Section 5 created a new statutory interest, supplementary to, but separate from the rights enforceable in a Fifteenth Amendment suit. It was Congress' answer to "nearly a century of systematic resistance to the Fifteenth Amendment * * *." *South Carolina* v. *Katzenbach,* 383 U.S. 301, 328. The statute was designed to counter a specific form of resistance that had become familiar in the immediately preceding years: rapid enactment of new laws to undo or undercut the results of successful Fifteenth Amendment litigation. *Allen* v. *State Board of Elections,* 393 U.S. 544, 548. See also *United Jewish Organizations* v. *Carey,* No. 75–104, decided March 1, 1977, slip op. 10–11 (opinion of Mr. Justice White). Congress therein directed the automatic suspension of all new election requirements in covered jurisdictions, including reapportionment (*Georgia* v. *United States, supra; Allen* v. *State Board of Elections; supra; Beer* v. *United States,* 425 U.S. 1302; *United Jewish Organizations* v. *Carey, supra*), subject to alternative procedures for administrative or judicial determination that "continued suspension of the new rule is unnecessary to vindicate rights guaranteed by the Fifteenth Amendment." *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 335. Section 5

shifted to the covered jurisdictions of making the burden the initial showing, either to the Attorney General or to the District Court for the District of Columbia, that new voting enactments did not have a discriminatory purpose or effect. *Georgia* v. *United States, supra,* 411 U.S. at 538. It was hoped that this procedure would make constitutional litigation unnecessary in the great majority of instances. *South Carolina* v. *Katzenbach, supra,* 383 U.S. at 327–328.

The suspension and preclearance procedure of Section 5 has five legally significant effects upon the rights of voters in covered jurisdictions. First, it frees them from the requirement of complying with changed election laws or procedures until the changes are shown to have no racially discriminatory purpose or effect. Second, it interposes the federal government between the voter protected by the Fifteenth Amendment and the covered jurisdiction. Third, it imposes on the jurisdiction, not the citizen, the burden of initiating clearance proceedings. Fourth, it transfers the venue of such proceedings to the District of Columbia. Fifth, it places the burden of proving the absence of discriminatory purpose or effect upon the covered jurisdiction.

Congress adopted this "unusual and * * * severe procedure" (*Allen* v. *State Board of Elections,* 393 U.S. 544, 556) because it found that "existing remedies were inadequate" (*ibid.*) to assure vindication of Fifteenth Amendment rights in the face of persistent efforts in some States to defeat them. See *South Carolina* v. *Katzenbach, supra,* 383 U.S. at

309. By these new statutory procedures, Congress intended "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens" (*Allen, supra,* 393 U.S. at 556).

The Attorney General's role in passing upon Section 5 submissions is essential to the achievement of this purpose. As recently observed in a case involving a state's response to the Attorney General's action under Section 5 (*United Jewish Organizations* v. *Carey,* No. 75–104, decided March 1, 1977, slip op. 7–8) (Mr. Justice Brennan, concurring):

> The participation of the Attorney General, for example, largely relieves the judiciary of the need to grapple with the difficulties of distinguishing benign from malign discrimination. Under § 5 of the Act, the Attorney General in effect is constituted champion of the interests of minority voters, and accompanying implementing regulations ensure the availability of materials and submissions necessary to discern the true effect of a proposed reapportionment plan. See 28 C.F.R. § 51.19. This initial right of review, coupled with the fact-finding competence of the Justice Department, substantially reduces the likelihood that a complicated reapportionment plan that silently furthers malign racial policies would escape detection by appropriate officials.

The whole scheme of the Act thus rests upon the premise that the Attorney General will make an independent determination to assure protection of minority voting rights.[11] Congress expected the Attorney General to give his careful and good-faith

consideration to § 5 submissions and, within 60 days after receiving all information he deemed necessary, to make up his mind as to whether the proposed change did or did not have a discriminatory purpose or effect, and if it did, to object thereto" (White, J., dissenting on other grounds in *Georgia* v. *United States, supra,* 411 U.S. at 543). The Act has twice been extended on this understanding. 84 Stat. 315; 89 Stat. 402, 404.[11]

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[11] The legislative understanding that the Attorney General would in each case make an independent determination was summarized in connection with the 1975 extension and amendment of the Voting Rights Act, 89 Stat. 404, 42 U.S.C. (Supp. V) 1973c. The House Judiciary Committee expressly noted that (H.R. Rep. No. 94–196, 94th Cong., 1st Sess., pp. 8–9 (1975) (emphasis added)):

"Section 5 of the Act *requires* review of all voting changes prior to implementation by the covered jurisdictions. The review may be conducted by either the U.S. District Court for the District of Columbia or by the Attorney General of the United States.

* * * * *

"It was not until after the 1970 Amendments that Section 5 actually came into extensive use. At the time of the adoption of those amendments, Congress resisted attempts to repeal the preclearance provisions, and in so doing gave a clear mandate to the Department of Justice that it improve enforcement of Section 5 * * *. * * * On September 10, 1971, the Department of Justice for the first time adopted regulations for implementing Section 5's preclearance provisions" (36 Fed. Reg. 18186).

The regulations described in the House Report, *supra*, expressly require the Attorney General to make an independent determination, just as would the District Court for the District of Columbia. 28 C.F.R. 51.19. See note 15, *infra*, pp. 27–28.

If in reconsidering the Act in 1975 Congress had disagreed with the Attorney General's interpretation of Section 5, "it had ample

A determination by the Attorney General to defer to a district court without making an independent determination with respect to legislation which has not been declared by the District Court for the District of Columbia to meet Section 5's substantive requirements has a substantial, adverse effect on the rights of voters protected by that Section. The immediate consequence of the Attorney General's failure to decide is the lifting of the automatic suspension and elimination of the need for clearance in a proceeding by the covered jurisdiction before the District of Columbia court. Thereafter, all citizens of the covered jurisdiction must adhere to the new voting requirements. If those requirements perpetuate racial discrimination, the sole remedy for vindication of Fifteenth Amendment rights is a private suit in which the citizen must carry the burden of proving racially discriminatory purpose or effect. This is, however, the very remedy that Congress found to be inadequate, and that it sought to supplement by the

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opportunity to amend the statute." *Georgia* v. *United States*, *supra*, 411 U.S. at 533. "Its failure so to do requires the conclusion that the regulation was not inconsistent with the intent of the statute." *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U.S. 269, 273.

Aspects of the Attorney General's regulations imposing the burden of proof on covered jurisdictions and delaying the running of the 60-day period under Section 5 until the Attorney General had received sufficient information were sustained in *Georgia* v. *United States*, *supra*, 411 U.S. at 531–540. The Court there noted that "[t]he judgment that the Attorney General *must* make is a difficult and complex one, and no one would argue that it should be made without adequate information." *Id.* at 540 (emphasis added).

suspension and preclearance provisions of Section 5 (see pp. 19–20, *supra*). That Section's five effects (p. 19, *supra*) provide the requisite support for private actions to enjoin the implementation of voting changes by covered jurisdictions in the absence of the required clearance under Section 5. *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 556–557. Since these privately enforceable statutory rights may be lost forever when the Attorney General fails to object, it is incorrect to reason, as did the district court, that no legal rights are determined when the Attorney General announces his determination to defer, rather than to exercise his judgment on the merits.[12]

On the contrary, such a deferral entails substantial legal consequences, since it removes the barrier to enforcement of the state law imposed by Section 5. It has the practical effect of eliminating the protections of Section 5 and of authorizing a change in the state's voting laws.

These consequences, however, do not in themselves establish that a judicial remedy is available to review a policy of the Attorney General that results in failure to exercise his independent discretion under Sec-

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[12] For these reasons, the district court's reliance on *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, is misplaced. The Court there held unreviewable an agency's determination of probable cause to refer a drug company's case to the Attorney General for the institution of seizure proceedings because its only consequence was to subject the company to possible suit. As we have shown above, the determination here has immediate effects on the voting rights of citizens.

tion 5. For it is not unreasonable to read the language of the proviso to Section 5 that makes preclearance by the Attorney General an alternative to a declaratory judgment suit in the District of Columbia, as permitting a voting change to become effective if the Attorney General has failed to act within 60 days for any reason, or for no reason at all.[13] See *Harper* v. *Levi, supra,* 520 F. 2d at 73–74 (MacKinnon, J., dissenting); *State Board of Election Commissioners* v. *Evers,* 405 U.S. 1001 (Blackmun, J., concurring). But such a reading of the statute would set at naught the protections Congress intended for minority voters because of an administrative official's failure to exercise his independent responsibili-

[13] The proviso presently reads as follows (42 U.S.C. (Supp. V) 1973c):

"*Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section."

ties. The consequences of such a failure would fall not on the official, but on the minority voters. In view of the important rights involved, such a construction would be at odds with the intent of Congress and should be rejected. Cf. *Connell Co.* v. *Plumbers & Steamfitters,* 421 U.S. 616, 628–633.

Although the language and history of Section 5 demonstrate that the Attorney General's determination is to be made swiftly (*Georgia* v. *United States, supra,* 411 U.S. at 539) and independently (*Perkins* v. *Matthews,* 400 U.S. 379, 385), they do not support the district court's conclusion that Congress foreclosed the kind of limited judicial relief exercised in *Harper.* The provision for clearance by the Attorney General within a fixed period was suggested by then Attorney General Katzenbach in response to concerns that plainly lawful state legislation would be unduly delayed pending a declaratory judgment action in the District Court for the District of Columbia. The Attorney General suggested that the declaratory judgment action could be limited "to those laws which the Attorney General takes exception to within a given period of time." Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., Pt. 1, 237 (1965). He did not suggest that judicial review was to be totally foreclosed, nor did anyone else.[14]

The sixty-day limit contained in Section 5 is not evidence that Congress intended to foreclose limited

[14] The history is summarized in *Harper* v. *Levi, supra,* 520 F. 2d at 65. Section 8 of the original bill (S. 1564, 89th Cong., 1st Sess.

judicial review. It serves to assure expeditious clearance by the Attorney General of changes in state law which comply with the substantive standards of Section 5 as part of "[t]he alternative procedure of submission to the Attorney General [that] 'merely gives the covered State a rapid method of rendering a new State election law enforceable.' *Allen* v. *State*

(1965)) provided only for preclearance by the District Court for the District of Columbia. Attorney General Katzenbach's suggestion was made at Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess, Pt. 1, 237 (1965). Although Mr. Katzenbach's suggestion was taken up and incorporated into the bill, neither the Committee reports nor the debates discuss the proposal. S. Rep. No. 162, 89th Cong., 1st Sess. (1965); H.R. Conf. Rep. No. 711, 89th Cong, 1st Sess, (1965). Thus, as noted in *Harper* (520 F. 2d at 65 n. 95), "[t]he only explanation is the testimony of Attorney General Katzenbach."

In 1975, the statute was amended to provide that "[i]n the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty day period which would otherwise require objection" (Pub. L. 94–73, Section 405, 89 Stat. 404). Contrary to appellees' contention (Br. 38 n. 69), this amendment did not reflect an understanding that failure of the Attorney General to make an independent determination, when expressed in an affirmative indication that he will not object, validates changes in a state's voting laws. The purpose of these amendments was to "codify the already existing expedited consideration procedures which the Department of Justice has established in its Section 5 regulations." 28 C.F.R. 51.22; H.R. Rep. No. 94–196, 94th Cong., 1st Sess., p. 35 (1975). The regulations, and the amendment, were designed to provide for the situation in which the Attorney General had made an independent determination within the 60-day period only to learn that he had done so on the basis of an inadequate submission. The amendment thus confirms that Congress intended the Attorney General to make an informed, independent ruling.

Board of Elections, 393 U.S., at 549." *Georgia* v. *United States, supra,* 411 U.S. at 538. By establishing this convenience for covered jurisdictions, Congress did not intend merely to provide the Attorney General with an opportunity to act; it required him to make an independent substantive determination.

Congress could safely assume that the Attorney General's adoption of a policy contrary to this obligation to exercise independent judgment would be subject to the presumption of reviewability contained in the Administrative Procedure Act (5 U.S.C. 701–706) (see *Dunlop* v. *Bachowski,* 421 U.S. 560, 567; *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140)—and, specifically, to that Act's provisions (now 5 U.S.C. 706(1)) for a limited judicial remedy to compel the exercise of administrative discretion. "Any less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States, supra,* 411 U.S. at 538. Thus the sixty-day limit is not conclusive of the rights of the citizens protected by Section 5, where the Attorney General has failed to exercise his independent discretion within that period.[15]

Rather, in light of the statute's history and purpose, and in light of the policies underlying the gen-

[15] In a deposition taken in this case, Mr. Gerald W. Jones, Chief of the Voting Rights Section of the Civil Rights Division of the Department of Justice, was asked whether a description of Section 5 procedures which included the statement that "[i]f the 60 days pass and the Attorney General has taken no action or has

eral grants of limited reviewing authority in the courts,[16] we submit that the extent to which judicial review of the Attorney General's action or inaction under Section 5 is proper depends on whether such review is a reasonable effectuation of the purposes of

not objected, the change can be put into effect" (A. 39) was an accurate statement of the policy and practice of the Voting Rights Section (A. 40). Mr. Jones testified that the description was "a correct statement of the general practice of the voting section in administering section 5 and is, as outlined in the Administrative Procedures for the administration of section 5" (A. 41). Mr. Jones' testimony merely confirms, *inter alia*, that if the Attorney General, in exercising his function under the statute, does not interpose an objection within the 60-day period the change may be put into effect. It does not mean that the Attorney General can fail to consider a proper submission under Section 5. The section would be meaningless if it did not contemplate that the Attorney General would consider the submission and decide whether or not to interpose an objection.

Moreover, the regulations referred to, entitled "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" (28 C.F.R. Part 51), also contemplate that the Attorney General will give full consideration to every submission and will exercise his judgment whether or not to interpose an objection. These regulations specify, *inter alia*, the standards to be applied by the Attorney General in considering submissions from covered jurisdictions (§ 51.19); the procedures for notifying jurisdictions of receipt of a submission (§ 51.16), the return of inappropriate submissions (§ 51.17), the obtaining of further information regarding a submission (§ 51.18), notifying the jurisdiction of the Attorney General's decision to object (§ 51.21) or not to object (§ 51.20), giving a particular submission expedited consideration (§ 51.22), reconsideration of a submission (§§ 51.23, 51.24), and withdrawal of an objection (§ 51.25); and the records concerning submissions to be kept by the Attorney General (§ 51.26).

[16] See 28 U.S.C. 1361 (district courts have jurisdiction of suit to compel performance of official duty); 5 U.S.C. 706(1) (reviewing court may compel agency action unlawfully withheld). Venue for such actions would appear to be confined to the District of Columbia. 42 U.S.C. 1973*l*(b).

the Act.[17] In considering that question, it should be kept in mind that if a state finds the Attorney Generals' delays unreasonable, or if he objects to the submission, "the State may still enforce the legislation upon securing a declaratory judgment in the District Court for the District of Columbia." *Allen* v. *State Board of Elections, supra,* 393 U.S. at 549. But unless there is limited judicial review to assure that the Attorney General does not pursue an erroneous policy of refusing to exercise his independent discretion, the minority voters whose interest the Attorney General is to safeguard will have no remedy whatever under Section 5.

We submit, therefore, that as a proper counterbalance to the right of states to obtain a *de novo* determination under Section 5 from the District Court in the District of Columbia, notwithstanding the Attorney General's refusal to clear proposed voting changes, protected minority voters have a right to judicial review for the limited purpose of compelling

[17] A similar approach was adopted by the Court in sustaining the Attorney General's Section 5 regulations that placed the burden of proving compliance with the statute's standards on covered jurisdictions. *Georgia* v. *United States, supra.* See note 11, pp. 21–22, *supra.* Similarly, the Attorney General's regulation delaying the running of the 60-day period until a complete submission is tendered, was sustained in *Georgia* v. *United States* as consistent with Section 5 because the only other "plausible response to an inadequate or incomplete submission would be simply to object to it." 411 U.S. at 540. Such an objection would be in effect a determination that the state had failed to carry its burden of proving the absence of discriminatory purpose or effect, and thus would represent a valid exercise of the Attorney General's independent discretion under Section 5.

the Attorney General to exercise his independent discretion when, pursuant to an erroneous policy, he has failed to do so.

Such an action is a restricted, familiar and traditional judicial remedy. Indeed, as the *Harper* court noted, the proceeding in that case was instituted and prosecuted in the District Court for the District of Columbia under its "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. 1361; *Harper* v. *Levi, supra,* 520 F. 2d at 64 n. 87. Such jurisdiction is consistent with the power of reviewing courts, under the Administrative Procedure Act, to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).

The scope of that remedy, however, is extremely narrow. The minority citizens seeking review in *Harper* contended "simply, and the District Court held only, that the Attorney General improperly relinquished his responsibility to independently evaluate the submitted legislation in light of the standards established by Section 5." *Harper* v. *Levi, supra,* 520 F. 2d at 67. Thus the court in *Harper* expressed "no opinion on reviewability of a determination not to object allegedly involving an erroneous application of § 5's purpose-effect standard." *Id.* at 67 n. 115.[18]

[18] Indeed, it noted "that orthodox judicial review of a decision to interpose an objection presents different questions. It may be that Congress intended to confine review of such a decision to the declaratory judgment action specified in § 5." 520 F. 2d at 67 n. 115. This seems indicated by *Allen* v. *State Board of Elections*, *supra*, 393 U.S. at 562; and *United Jewish Org. of Williamsburgh* v. *Wilson*, 510 F. 2d 512, 520 (C.A. 2), affirmed *sub nom. United Jewish Organizations* v. *Carey*, No. 75-104, decided March 1, 1977.

"It is a familiar rule that a court may exercise its equity powers, or equivalent mandamus powers, * * * to compel courts, boards, or officers to act in a matter with respect to which they may have jurisdiction or authority, although the court will not assume to control or guide the exercise of their authority." *Virginian Railway Co.* v. *System Federation No. 40,* 300 U.S. 515, 551 (dictum) (citation omitted). See, also, *Panama Canal Co.* v. *Grace Line, Inc.,* 356 U.S. 309, 317–318. As the court of appeals stated in *Harper* (520 F. 2d at 63):

> The crucial consideration is that, though decision-making is dictated, the decision itself is not—the Attorney General, though compelled to decide, is left completely unfettered as to how to decide.

The order entered by the *Harper* court resulted from the Attorney General's "deferral"—which was not authorized by law. It is analogous to the relief afforded in *Thermtron Products, Inc.* v. *Hermansdorfer,* 423 U.S. 336. In that case, a federal district court to which a diversity action had been removed remanded the case to state court in the interest of expedition, on the ground that its docket was overcrowded. Under 28 U.S.C. 1447(c), a district court may remand the case if it was "removed improvidently and without jurisdiction." Review of such a remand order is expressly pro-

hibited by 28 U.S.C. 1447(d). The defendants who had sought the removal, however, applied for a writ of mandamus to the Court of Appeals for the Sixth Circuit. That court denied the writ, but this Court reversed. Similarly to the case of Section 5 submissions, which the Attorney General may "clear" by making an independent decision not to object within 60 days, the district court in *Thermtron* could have remanded the case as "improvidently removed" and no review would have been available. 423 U.S. at 343. But where the district court explicitly based its remand order on a ground not authorized by law, this Court held, the court of appeals had both the power and the duty to "review" the order by writ of mandamus and compel the district court to take jurisdiction of the case.

Here the Attorney General's decision to defer to the *Twiggs* court has been shown by subsequent decisions of this Court to have been erroneous (see p. 16, *supra*). As we now understand the law in light of *Connor* v. *Waller, supra,* the Attorney General should have exercised his independent authority to review Act 1205. Accordingly, the *Harper* court's order did no more than require the Attorney General to perform the responsibilities placed on him by the Voting Rights Act.[19] It did not interfere with the exercise of

[19] See also *Briscoe* v. *Levi*, 535 F. 2d 1259 (C.A.D.C.), certiorari granted, December 6, 1976, No. 76–60, where the court of appeals in considering the 1975 amendments to the Voting Rights Act stated (535 F. 2d at 1265): "It is * * * apparent that even where the intent of Congress was to preclude judicial review, a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority."

his independent authority to decide whether the submitted act had the purpose or effect of denying or abridging the right to vote on account of race.

In holding that such limited judicial relief is a nullity to be disregarded, the decision below is inconsistent with *Dunlop* v. *Bachowski,* 421 U.S. 560. This Court there held that the Administrative Procedure Act authorizes judicial review, for limited purposes, of a decision of the Secretary of Labor not to bring a civil action to set aside a union election under Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 534, 29 U.S.C. 482(b). The court below purported to distinguish *Bachowski* on the ground that suit by the Secretary was the exclusive remedy for irregularities in a union election, and plaintiffs there thus had no adequate remedy at law. The same is true, we submit, with respect to Section 5, since a determination by the Attorney General to defer to the district court ruling and not to decide independently whether to object under Section 5 leaves a state's voters without the protections of that statute. His non-objection based on such a determination affects the statutory rights of the state's electorate under the Voting Rights Act at least as much as the Secretary's decision not to challenge a union election affects the rights of the union electorate under the LMRDA.[20]

[20] Appellants, on the other hand, contend (Br. 14–20) that this Court need not determine whether the decision in *Harper* is correct because the single-judge district court in that case issued an interlocutory order declaring that the Attorney General's time to object

Indeed, the holding below that a voter suit under the Fifteenth Amendment is an adequate remedy at law not only is contrary to the congressional finding that such relief is inadequate, it also misconstrues the language of 5 U.S.C. 704, which defines the kinds of administrative actions subject to judicial review. That section expressly provides for judicial review of "final *agency* action for which there is no other adequate remedy in a court * * *" (emphasis added). A private suit challenging a state voting law under the Fifteenth Amendment does not involve review of "agency" (the Attorney General's) action under Section 5. Thus the right to an independent exercise of discretion by the Attorney General before the pro-

had not expired, and would be extended until he acted or until further order of the court. The Attorney General subsequently interposed his objection. See Statement, *supra*, pp. 6–7. Under *United States* v. *United Mine Workers*, 330 U.S. 258, the argument continues, the court's order was intended to preserve the status quo pending the court's determination of its jurisdiction, and therefore was within the inherent powers of the district court. Appellants thus argue that because the Attorney General's objection was interposed pursuant to that order, it prohibits the effectuation of Act 1205. This aspect of *Mine Workers*, however, involved the power of the district court to impose contempt sanctions upon a party for disobeying an order directed to it. In this case South Carolina was not a party to the *Harper* litigation and was not under a court order restraining enforcement of Act 1205. *Mine Workers* therefore has no application here. The Attorney General's objection was interposed only because the *Harper* court ordered him to exercise his independent authority and not to defer to the ruling of the *Triggs* court. The validity of that interlocutory order depends upon the reviewability of the Attorney General's deferral policy. If that policy was not reviewable, the interlocutory order was invalid, and hence the objection interposed pursuant to it would be invalid.

tections of Section 5 are lifted is enforceable by the judiciary in proceedings for judicial review, for the same reasons that the rights of a union electorate are enforceable by a limited (although somewhat broader) review of the Secretary of Labor's decision not to challenge a union election.

There is no unfairness in affording this limited judicial review to voters even though covered jurisdictions cannot obtain review of the Attorney General's determination and are instead confined to the declaratory judgment proceeding in the District of Columbia. Perfect symmetry in judicial review proceedings is not required, so long as the substantial rights of all parties may be asserted in a judicial forum. See, *e.g.*, *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*, 383 U.S. 576 (rail carrier may obtain review of administrative reparations order only in defense of enforcement action by shipper). The *de novo* suit provided for in the District of Columbia is a full and complete remedy for covered jurisdictions.[21] *South Carolina v. Katzenbach, supra,* 383 U.S. at 332.

The court below also emphasized the congressional purpose to allow the Attorney General freely to exercise his discretion regarding compliance with the substantive requirements of Section 5 (J.S. App. 22a–23a). We agree that the preservation of that discretion is of great importance to the administration of

[21] Although not an indispensable party (*Harper* v. *Kleindienst*, *supra*, 362 F. Supp. at 744), a covered jurisdiction, of course, may intervene in any suit challenging the Attorney General's failure to object and defend its interest. Appellees did not do so here.

the Voting Rights Act. In our view, however, the *Harper* ruling correctly supports that policy, by requiring the Attorney General to exercise his discretion. We believe that a proper reading of the limited judicial review undertaken by the *Harper* court—review in the nature of mandamus of the Attorney General's failure to exercise his discretion on the basis of a stated policy [22] found by the *Harper* court to be contrary to the procedural requirements of the Voting Rights Act—will not interfere with the substantive determinations committed by Section 5 to the discretion of the Attorney General.

The Senate apportionment in Act 1205 has been in effect for legislative sessions since 1973 (A. 53). In November 1976 state Senators were elected for four-year terms under that plan (see Brief for Appellants, pp. 31–32). As shown above, the use of this plan violates the Voting Rights Act, and inflicts irreparable injury on the voters of South Carolina. We support appellants' request for special elections to be held in November 1978 to coincide with statewide legislative, congressional and gubernatorial elections (*ibid.*) because plaintiffs have diligently pursued their rights, and special elections will not cause undue disruption of the State's legislative process or prejudice the rights of any voters. Cf. *Town of Sorrento* v. *Reine,* 425 U.S. 946; *Hadnott* v. *Amos,* 394 U.S. 358; *Swann* v. *Adams,* 383 U.S. 210.

In sum, we submit that, in light of *Connor* v. *Waller, supra,* and *Dunlop* v. *Bachowski, supra,* the

[22] See pp. 15–16, *supra.*

decision in *Harper* v. *Levi* was correct, and that the district court erred in refusing to enforce the Attorney General's objection interposed pursuant to Section 5 and the *Harper* court's order. In the alternative, if the Court considers Act 1205 to embody a court-ordered plan within the meaning of *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636, then the district court abused its discretion by authorizing multimember districts. See note 8, p. 13, *supra.* In either event special elections should be conducted in November 1978 under a lawfully adopted plan.

CONCLUSION

The judgment of the district court should be reversed with directions to enter judgment for appellants to require that special elections be held under a proper plan no later than November 1978.

Respectfully submitted.

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April ~~MARCH~~ 1977.

APPENDIX A

THE STATE OF SOUTH CAROLINA

At a General Assembly Begun to be Holden at Columbia, on the Second Tuesday in January, in the Year of Our Lord One Tho. and Nine Hundred and Seventy-Two, and Thence Continued by Divers Adjournments to the —— day of ——

In the Year of Our Lord One Thousand Nine Hundred and Seventy-Two

An Act No. 1205

To Reapportion the Senate of the General Assembly of South Carolina

Be it enacted by the General Assembly of the State of South Carolina

Section 1. The General Assembly makes findings of fact and statements of policy as follows:

1. It is the public policy of this State that counties, as constitutionally recognized political subdivisions of this State, shall be treated as basic units to construct election districts for the reapportionment of the Senate; and because of historical association, the charging of counties with various responsibilities incident to the operation of State government, the organization of county governments, special purpose districts, school districts and other governmental units of common interest, and the enactment by this Assembly of local legislation for such counties, it is the public

policy of the State that in reapportioning the Senate, and in order to deter the possibilities of gerrymandering, county boundaries should not be disturbed.

2. It is found by the General Assembly that, in order to achieve effective representative government, when it becomes necessary to group counties into a senatorial district for purposes of reapportionment of the Senate, they shall be grouped on the basis of compactness, proximity, common economic interests and characteristics, comparable geographical features and degree of urbanization.

3. The difficulty of reapportioning the Senate within acceptable tolerances, both presently and in the future, makes desirable the establishment of senatorial districts with considerable flexibility or variation in the number of Senators and the number of counties for each election district.

4. It is the policy of this state, using the findings set forth above, to adopt a plan of reapportionment based substantially on population and to avoid any dilution of the equal population plan in any significant way.

5. That the General Assembly as a whole and acting through committees had the matter of reapportioning of the Senate before it from March 23, 1971 until November 11, 1971 when Act No. 932 of 1971 was signed by the Governor. That being cognizant of the gravity of this matter and the time element necessary to properly conduct the elections in 1972, it immediately directed the Attorney General of the State under the provisions of Concurrent Resolution S 671 to immediately institute an action to determine the validity of Act No. 932 of 1971. That as a result

of the latter action an order of the three judge court for the District of South Carolina, Columbia Division, was issued on April 7, 1972, declaring the 1971 act invalid and granting the General Assembly thirty days in which to enact another plan for its consideration which would be within the guidelines set forth in the order.

6. That thereafter the Joint Legislative Committee on Senate Reapportionment met and recommended a plan to reapportion the Senate containing the provisions hereinafter set forth in Plan A.

That thereafter the Senate adopted the Joint Legislative Committee's recommendation and passed a bill to reapportion the Senate containing the provisions set forth in Plan A. That the House of Representatives then amended the Bill and passed the same containing the provisions hereafter set forth as Plan B. That thereafter a Conference Committee was appointed which has been deliberating but that under the time limitations the differences have not been reconcilable to this date and that rather than to default in the matter it is the consensus of the General Assembly that the plans which have been adopted by the separate Houses should be submitted to the Court with the firm belief that one of the plans so submitted will be acceptable to and adopted by the Court as being in compliance with the guidelines set forth in its order.

7. That the attached exhibit is made a part of this act to give a ready reference as to how the plans meet the guidelines and criteria set forth in the Court's order of April 7, 1972.

SECTION 2. Effective with the 1972 elections, the State of South Carolina is hereby divided into the following Senatorial Districts:

PLAN A

		Number Senators	1970 population	Percent variance from average
1	Abbeville	4	226, 270	+0. 45
	Anderson			
	Oconee			
	Pickens			
2	Greenville	5	290, 259	+3. 08
	Laurens			
3	Greenwood	1	57, 641	+2. 35
	McCormick			
4	Spartanburg	3	173, 724	+2. 83
5	Cherokee	2	109, 822	−2. 49
	Newberry			
	Saluda			
	Union			
6	York	3	163, 271	−3. 36
	Lancaster			
	Kershaw			
7	Chester	5	283, 678	+0. 75
	Fairfield			
	Richland			
8	Edgefield	4	228, 853	+1. 59
	Aiken			
	Barnwell			
	Bamberg			
	Lexington			
9	Lee	2	107, 979	−4. 13
	Chesterfield			
	Marlboro			
	Dillon			
10	Darlington	1	53. 442	−5. 10
11	Florence	4	224, 141	−0. 50
	Marion			
	Horry			
	Williamsburg			
12	Sumter			
	Clarendon	2	105, 029	−6. 75
13	Calhoun			
	Orangeburg			
	Dorchester	2	112, 845	+0. 19

		Number Senators	1970 population	Percent variance from average
14	Berkeley	1	56, 199	−0. 21
15	Allendale	2	116, 213	+3. 18
	Hampton			
	Jasper			
	Beaufort			
	Colleton			
16	Charleston	5	281, 150	−0. 15
	Georgetown			

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.

In the event that Plan A does not meet the constitutional guidelines as set forth by the Three Judge Federal Court in its order of April 7, 1972, then the Senate of South Carolina shall be apportioned as follows:

PLAN B

		Number Senators	1970 population	Percent variance from average
1	Abbeville	3	167, 314	−1
	Anderson			
	Oconee			
1A	Pickens	1	58, 959	+4. 68

Provided, that if the Court determines that the division of District 1 into Districts 1 and 1A consti-

tutes an unacceptable variance, they shall be joined and designated as District 1 with four Senators assigned thereto.

		Number Senators	1970 population	Percent variance from average
2	Greenville	5	290, 259	3. 08
	Laurens			
3	Spartanburg	3	173, 724	2. 83
4	Greenwood	1	57, 641	2. 35
	McCormick			
5	Cherokee	4	215, 145	−4. 49
	Chester			
	Fairfield			
	Lancaster			
	York			
6	Newberry	1	58, 503	3. 88
	Union			
7	Richland	4	233, 868	3. 82
8	Calhoun	2	114, 320	1. 50
	Lexington			
	Saluda			
9	Aiken	2	106, 715	−5. 25
	Edgefield			
10	Allendale	2	112, 607	−0. 02
	Bamberg			
	Barnwell			
	Orangeburg			
11	Beaufort	2	106, 521	−5. 42
	Colleton			
	Hampton			
	Jasper			
12	Charleston	5	279, 926	−0. 59
	Dorchester			
13	Lee			
	Chesterfield	1	51, 990	−7. 68
13–A	Marlboro			
	Dillon	1	55, 989	−0. 58

Provided, that if the Court determines that the division of District 13 into Districts 13 and 13A constitutes an unacceptable variance, they shall be joined and designated as District 13 with two senators assigned thereto.

		Number Senators	1970 population	Percent variance from average
14	Kershaw	2	114, 152	1. 35
	Sumter			
15	Clarendon	2	115, 240	2. 32
	Florence			
16	Georgetown	3	168, 005	−0. 56
	Horry			
	Marion			
	Williamsburg			
17	Berkeley	1	56, 199	−0. 21
18	Darlington	1	53, 442	−05. 10

Each senate office shall constitute a separate and distinct office to which a separate number shall be assigned within each senatorial district. A candidate for the office of Senator within any such district shall be required to qualify for a specific senate office and shall not be permitted to qualify for more than one such office in any one election for the office of Senator.

The election ballots for the office of Senator in each district shall reflect the number assigned to each senate office and the names of the candidates for each.

SECTION 3. Each House office in this State shall constitute a separate and distinct office to which a separate number shall be assigned within each election district for such an office. A candidate for such an office shall be required to qualify for a specific office and shall not be permitted to qualify for more than one such office in any one election.

The election ballots for House offices shall reflect the number assigned to each office and the names of the candidates.

SECTION 4. This act shall take effect upon approval by the Governor.

In the Senate House the 5th day of May, 1972, the Year of Our Lord One Thousand Nine Hundred and Seventy-two——

_____ _____,
President of Senate

_____ _____,
Speaker of the House of Representatives, Pro Tempore

Approved the 6th day of May, 1972

_____, *Governor*

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, COLUMBIA DIVISION

CIVIL ACTION NOS. 71-1106, 71-1123, 71-1211

MAGGIE H. TWIGGS, PLAINTIFF

v.

JOHN C. WEST, GOVERNOR OF SOUTH CAROLINA, O. FRANK THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, EARLE E. MORRIS, LIEUTENANT GOVERNOR, PRESIDENT OF THE SOUTH CAROLINA SENATE, AND LOVICK O. THOMAS, CLERK OF THE SENATE OF THE SOUTH CAROLINA GENERAL ASSEMBLY, DEFENDANTS

AND

DANIEL R. MCLEOD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND AS ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, PLAINTIFF

v.

JOHN C. WEST, GOVERNOR OF THE STATE OF SOUTH CAROLINA, EARLE E. MORRIS, JR., LIEUTENANT GOVERNOR OF THE STATE OF SOUTH CAROLINA AND PRESIDENT OF THE SOUTH CAROLINA SENATE, LOVICK O. THOMAS, CLERK OF THE SOUTH CAROLINA SENATE,

AND G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS, AND ERNEST A. FINNEY, AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA STATE ELECTION COMMISSION, DEFENDANTS

GILBERT E. MCMILLAN AND C. KENNETH POWELL,

PLAINTIFFS-INTERVENORS

AND

MATTHEW D. MCCOLLUM, TOBIAS GADSEN, FLOSSIE GORDON, EUGENE CAMPBELL, LEVI G. BYRD, JAMES CRAWFORD, SAMUEL BOLDEN, LEVERNE STEVENSON, QUINCY SMITH, WILLIAM MCKINLEY BOWMAN, JOHN ROY HARPER II, W. F. GIBSON, MOSES DILLIARD, JERRY WILSON, I. DAY WATSON, MRS. VICTORIA DELEE, MRS. DOROTHY L. MATTHEWS, MRS. RACHEL H. JOHNSON, PLAINTIFFS

v.

JOHN C. WEST, GOVERNOR OF THE STATE OF SOUTH CAROLINA; EARLE E. MORRIS, JR., LIEUTENANT GOVERNOR OF THE STATE OF SOUTH CAROLINA AND PRESIDENT OF THE SOUTH CAROLINA SENATE; LOVICK O. THOMAS, CLERK OF THE SOUTH CAROLINA SENATE; AND G. P. CALLISON, MRS. MARGARET TOWNSEND, MRS. MARTHA C. CHAPMAN, EDGAR L. MORRIS AND ERNEST A. FINNEY, JR., AS MEMBERS OF AND CONSTITUTING THE SOUTH CAROLINA STATE ELECTION COMMISSION, DEFENDANTS.

Before HAYNSWORTH, Chief Judge, Fourth Judicial Circuit, and RUSSELL, Circuit Judge, and MARTIN, Chief District Judge, District of South Carolina.

ORDER

We have considered the Act of the South Carolina General Assembly, passed on May 5, 1972 and signed by the Governor on May 6, 1972, reapportioning the South Carolina Senate. We have reviewed each of the three plans in that Act as well as other plans submitted to the General Assembly. With the assistance of a computer, we sought to determine whether any other plan might be devised which would be materially better than those submitted by the General Assembly.

Plan A, which the General Assembly asked us to consider first, is within the guidelines set forth in our opinion of April 7, 1972, and no other plan submitted to the General Assembly or which the Court was able to devise is a substantial improvement over Plan A.

The Court finds Plan A complies with the requirements of the Constitution of the United States, and it is therefore approved.

Accordingly, it is ordered that the impending elections to the South Carolina Senate and all subsequent elections be held in conformity with Plan A of the Act unless it is revised by the General Assembly or until after the census of 1980 or the further order of this Court.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit
DONALD RUSSELL
United States Circuit Judge
J. ROBERT MARTIN, JR.
United States District Judge

U.S. GOVERNMENT PRINTING OFFICE: 1977